APPENDIX

POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

A. ***The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.***

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration. 18 U. S. C. §5010(b), §5017(c). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin* v. *United States,* 341 F. 2d 900 (10th Cir. 1965); *Workman* v. *United States,* 337 F. 2d 226 (1st Cir. 1964), with *Rogers* v. *United States,* 326 F. 2d 56 (10th Cir. 1963); *Tatum* v. *United States,* 310 F. 2d 854 (D. C. Cir. 1962).

But regardless of whether or not the District Court exceeded its jurisdiction by sentencing respondent to six years under the Youth Corrections Act, when the maximum legal term of punishment was five years, in either case, such a lengthy term of punishment, for the act involved, is so excessive and disproportionate, as to constitute a violation of the Eighth Amendment.

The Eighth Amendment bars "cruel and unusual" punishment. The Chief Justice has explained, in *Trop* v. *Dulles*, 356 U. S. 86, 99-100, 101 (1958):

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy as reflected in these words is firmly established in the Anglo-American tradition of criminal justice."
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> "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Constitutional limits to the length of punishment are established by the "standards of decency" of our society. In 1910, the then prevalent "standards of decency" compelled the striking down of a statute prescribing 12 to 20 years imprisonment for the entry of known false statements in a public record. *Weems* v. *United States*, 217 U. S. 349 (1910). *Cf. State ex rel. Garvey* v. *Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896) (six years imprisonment for illegally picking flowers in a public park voided as cruel and unusual punishment because it shocked the conscience of the court); see *People* v. *Elliot*, 272 Ill. 592, 112 N. E. 300 (1916).[50]

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[50] By 1947 the prevalent "standards of decency" had so evolved that four Justices of this Court held it would be cruel and unusual

Although the Supreme Court has not explicitly reversed a conviction on Eighth Amendment grounds since *Weems*, a number of recent decisions have provided some insights. Thus, in *Trop* v. *Dulles, supra,* Mr. Justice Brennan's concurring opinion condemns punishment which he finds to be nothing "other than forcing retribution from the offender —naked vengeance." (*Id.* at 112.) And in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 187 (1963), Mr. Justice Brennan restated his view that punishment was cruel and unusual, in violation of the Eighth Amendment, where it does not have a "rational or necessary connection" with the substantive evil at which it is presumably directed.

In *Robinson* v. *California,* 370 U. S. 660, 667 (1962), this Court reversed a conviction and 90 day sentence under a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. Mr. Justice Stewart, for the majority, held:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In determining contemporary "standards of decency" in Eighth Amendment terms, it will be helpful to compare the statute which is the subject of this indictment to the similar statutory provisions governing alien registration certificates. Had respondent been convicted of destroying an alien registration certificate, rather than a Selective

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punishment to subject a capital convict to a second attempt at electrocution, the first having failed. *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947).

Service System registration certificate, he would have been subject to disproportionately different punishment. Conviction of failure to possess an alien registration certificate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or $100 fine. Immigration and Nationality Act of 1952, §264(c); 8 U. S. C. §1304(8).[51] An alien who wilfully fails to register, still a misdemeanor, is subject to a maximum sentence of six months imprisonment and/or $1,000 fine. *Ibid.*, §266(a); 8 U. S. C. §1306(a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or $5,000 fine. *Ibid.*, §266(d); 8 U. S. C. §1306(d).

Prior to the 1965 amendment, the evil to which the statute seemed to be directed was the act of making an alteration or change in the registration certificate. Until the words "knowingly destroyed, knowingly mutilated" were added, there was little distinction in penalties between acts of counterfeiting and fraud in connection with alien registration certificates, and similar acts in connection with Selective Service System registration certificates.

It may be arguable that a five (or six) year penalty is not inappropriate for counterfeiting or similar fraudulent act in connection with a certificate issued by a government agency. But respondent's conviction, under this statute, has nothing to do with counterfeiting, fraud, stealth, deceit, or any other attempt to inveigle the government.

Respondent was sentenced to enormously heavy punishment for an act which, even if held to be within Congress' constitutional power, is considerably less heinous than the

[51] Similar misdemeanor punishment involving a maximum penalty of $100 and/or thirty days imprisonment is imposed for mutilation or defacement of the United States flag. 4 U. S. C. §3.

acts proscribed by the statute prior to the amendment. Such punishment, it is submitted, does not, in the words of this Court, "comport with the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles, supra,* at 101. It does not meet these standards because it is "so disproportionate to the offense committed as to shock the moral sense of the community * * *." 21 Am. Jur. 2d 564 [citing *Weems* v. *U. S., supra; Roberts* v. *Warden of Md. Penitentiary,* 206 Md. 246, 111 A. 2d 597 (1955); *State* v. *Evans,* 73 Idaho 50, 245 P. 2d 788 (1952); *Weber* v. *Commonwealth,* 303 Ky. 56, 196 S. W. 2d 465 (1946); *Cox* v. *State,* 203 Ind. 550, 181 N. E. 469 (1931)].[52]

B. *The imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act in punishment for the burning of a Selective Service registration certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.*

The proceedings in the District Court on sentencing as revealed by the record (R. 35-47), disclose that the sentencing judge imposed a six-year maximum indeterminate

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[52] See *Rudolph* v. *Alabama,* 375 U. S. 889 (1963), opinion by Mr. Justice Goldberg (joined in by Mr. Justice Douglas and Mr. Justice Brennan) dissenting from denial of certiorari and arguing that certiorari should have been granted to consider, *inter alia,* whether death penalty for rape violates " 'evolving standards of decency' * * * " (*id.* at 890).

sentence with the express intent that respondent would serve less than the maximum if he changed his beliefs and associations. The Court attempted to extract from respondent a disavowal of his philosophy of pacifism and his personal and organizational friendships and associations. See statement of the case, pp. 9-10, *supra.*

When the respondent remained steadfast, and refused to repudiate his friends, his organization (The Committee for Non-Violent Action), and his ideas, the Court imposed the maximum sentence. The Court expressed its hope that respondent might yet change "if you were removed from the influence of the[se] friends of yours" (R. 42). That the Court expressly conditioned the length of the indeterminate sentence on the respondent's changing his views and associations is candidly demonstrated by the warning that he would serve the full six years if "you are such a hardened case that they can't do anything with you" (R. 42).

The apparent purpose of an indeterminate sentence under the Federal Youth Corrections Act is to allow the prison authorities flexibility in "treatment" of youthful offenders. *United States* v. *Lane,* 284 F. 2d 935 (9th Cir. 1960). Treatment is defined as "corrective * * * guidance * * * designed to protect the public by correcting the anti-social tendencies of youth offenders." 18 U. S. C. §5006(g).

It is axiomatic that freedom of belief and association are protected by the First Amendment. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *Thomas* v. *Collins,* 323 U. S. 516 (1945). And it should be equally clear that a person convicted of a crime cannot have the terms and conditions of his incarceration and release conditioned upon his abandoning or changing his beliefs and associations. See *Jones* v. *Commonwealth,* 185 Va. 335, 38 S. E. 2d 444 (1946) (reversing disorderly conduct convictions of juveniles, "sen-

tenced" to attend church and Sunday school each Sunday for a year, on grounds of unconstitutionality of sentence under First Amendment).

A person under incarceration is obviously deprived of a great deal of his liberty, but he does not surrender all of his rights under the Constitution. He cannot be denied reasonable access to religious services of his own choice, where religious services are made available to other inmates, because of the unorthodoxy of his religion. *Pierce* v. *Lavalle,* 293 F. 2d 233 (2d Cir. 1961); *State* v. *Cubbage,* 210 A. 2d 555 (Del. 1965) (Black Muslims).

It would be plainly unconstitutional to condition the length of a prisoner's confinement to his abandoning his associations with the Black Muslims, or any other unorthodox religious group. It is similarly unconstitutional to condition the length of his confinement on his repudiation of his pacifist beliefs and associations. The imposition of unconstitutional conditions, particularly conditions impinging on freedom of belief and association, renders invalid governmental action which is otherwise valid. See *Speiser* v. *Randall,* 357 U. S. 513 (1958).

A defendant may be young enough to come within the ambit of special statutes dealing with the "treatment" or "rehabilitation" of juvenile or youthful offenders. But this does not mean that he can be deprived of the right to be fairly treated, *In re Gault,* 387 U. S. 1 (1967), and it certainly does not mean that a court can paternalistically force its own views on him. Juvenile courts may not order young persons to refrain from constitutionally protected civil rights demonstrations. *Griffin* v. *Hay,* 10 Race Rel. L. Rep. 111 (E. D. Va. 1965). See *In re Wright,* 251 F. Supp. 880 (M. D. Ala. 1965). Similarly, a Federal Court may not order a young pacifist, convicted of a Selective Service vio-

lation, to abandon his anti-war; anti-draft beliefs and associations, at the peril of serving the longest sentence which the Court can fashion.

It is submitted that such a sentence is not only a violation of First Amendment rights. It is likewise out of harmony with the "evolving standards of decency" that should characterize a civilized society, where freedom of belief and association are cherished. See *Trop* v. *Dulles, supra.* As such, it is cruel and unusual punishment, forbidden by the Eighth Amendment.